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IN THE

Supreme Court of the United States

OCTOBER TERM, 1947

No. 27

FEDERAL TRADE COMMISSION,
Petitioner,

vs.

HURON PORTLAND CEMENT COMPANY,
Respondent

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF FOR HURON PORTLAND CEMENT COMPANY

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OPINION BELOW

The opinion of the Circuit Court of Appeals is reported in 157 Fed. 2nd, 533.

STATEMENT OF CASE

The Federal Trade Commission filed a complaint on July 2, 1937, naming Huron Portland Cement Company (hereinafter sometimes referred to as "Huron") and seventy-five other manufacturers and sellers of portland cement,

and others, as respondents, and charging the respondents with having combined and conspired to violate the Federal Trade Commission Act and the Clayton Act as amended by the Robinson-Patman Act. A Cease and Desist order was entered against Huron and other respondents on July 17, 1943. Huron filed its petition in the Circuit Court of Appeals for the Seventh Circuit to review and set aside the Orders, Findings and other proceedings of the Commission and on October 31, 1946, said Circuit Court of Appeals entered its decree vacating and setting aside said Cease and Desist order of the Commission. The petition of the Federal Trade Commission for Writ of Certiorari was granted by this Court on March 10, 1947.

Because of its unique physical set-up and its distinct and individual methods of trading and pricing, Huron presented its separate case before the Commission and the Circuit Court of Appeals.

The proceedings before the Federal Trade Commission were contested by Huron primarily on the grounds that its pricing policies and trade practices were highly competitive and were legal in all respects; that it did not engage in the trade practices of which the Commission complained; that it was not a party to any combination or conspiracy to restrain competition in the price of cement or to discriminate in prices between purchasers of cement, and that it was at all times completely independent of its competitors in establishing, maintaining and changing its prices, price policies and trade practices.

In the proceedings in the Circuit Court of Appeals, Huron maintained the same position as it had taken before the Commission and demonstrated before that Court (1) not only that there was no substantial evidence in the record which controverted the contentions of Huron as

above stated, (2) but also that the Commission made no Finding of a fact or conclusion which had that effect. The same contentions are made in this Court.

The correctness of Huron's position in this case is demonstrated by the facts and we cite no law in this brief. Therefore, we present a Statement of Facts from the record which, so far as we know, the Commission has never disputed, and we base the primary argument in this brief on those facts.

STATEMENT OF FACTS

Physical Features

Huron was incorporated in 1907. It started business in a small way with its cement mill at Alpena, Michigan (R. 3904-5) which had a daily kiln capacity of 2500 barrels. It gradually worked up to 12,000 barrels a day (R. 3911) or an annual mill capacity of 4,000,000 barrels by enlarging its mill (R. 3905). The fines or pulverized stone and other raw materials necessary for the manufacture of cement are found within ten miles of Alpena and the available raw material is practically unlimited (R. 4009).

The market and sales volume for cement around Alpena is very small and would not exceed 200,000 barrels annually (R. 4010-11). Huron sought new markets to compete at greater distance (R. 4058). This was accomplished over a period of years by building ten auxiliary plants at various places on the Great Lakes and three specially designed boats to ship cement in bulk (App. III pp. 1707-8).*1

*1 References are made to Appendix A to the brief of respondents Aetna Portland Cement Co. et al., by use of the symbol "APP."

The auxiliary plants are equipped with machinery for conveying the bulk cement from the boats, storage bins for the bulk cement, equipment for packaging the cement in sacks, loading equipment, warehousing and offices (R. 4016). The sacked cement is loaded into cars and trucks for delivery (R. 3916) and, with the exception of the Duluth plant, the auxiliary plants are all equipped primarily for truck delivery. Trucks can drive up on one side of the warehouse and rail delivery is on the other side of the warehouse. The same loading crew can work both sides of the warehouse at the same time (R. 9940) so that it costs Huron no more to load by truck than by railroad car (R. 4085).

The three specially designed steamers are used primarily to deliver the cement in bulk to these auxiliary plants (R. 4016). The boats have special equipment for loading and unloading bulk cement (R. 3916).

The eleven plants of Huron are located at the following places, all being steamer ports on the Great Lakes, and were established in the years indicated (Fdgs. 2 (f), R. 15968, R. 9847, Res. Ex. 47) (App. III pp. 1425-6):

Alpena, Michigan	1908
Detroit, Michigan	1911
Cleveland, Ohio	1916
Duluth, Minnesota	1918
Milwaukee, Wisconsin	1923
Buffalo, New York	1928
Toledo, Ohio	1929
Oswego, New York	1932
Saginaw, Michigan	1932-35
Muskegon, Michigan	1937
Green Bay, Wisconsin	1938

All of these auxiliary plants are located in the heart of consuming centers. Based on a radius of 60 miles, which is the limit of 95% of Huron's deliveries by truck; these areas practically interlock and cover substantially all of the American Lake fronts of Lakes Huron, Erie and Ontario and a large part of the eastern and western shores of Lake Michigan and of Lake Superior adjacent to Duluth (R. 9924-5, Map. Res. Ex. 2392).

Delivery Practices

Huron has been a leader in the use of trucks for delivering cement from the plant to the customer. It is more economical to the contractor to use trucks since trucks deliver on the job, whereas a rail shipment delivers on the nearest side track (R. 3925) and then is transferred to trucks (R. 9923; R. 9936). Huron has always trucked cement from its Detroit plant and it refused to consider suggestions that trucking be eliminated (R. 3933-4). Huron originated trucking in several cities (R. 4026-7; R. 10,906).

In 1925 Huron delivered 61.4% of its cement by railroad and 38.6% by trucks. Year by year its deliveries by rail decreased and its deliveries by truck increased. In 1938 Huron delivered 25.8% of its cement by railroad and 74.2% by trucks. In 1938 its deliveries by trucks in Detroit, Saginaw and Cleveland exceeded 98%, 98% and 93% respectively (See detailed Table, Res. Ex. 63 and 2391).

The economical limit for delivery of cement by truck is 40 miles (R. 9933) (App. III p. 1441). The average length of Huron's truck haul is 20 miles (R. 9924). Huron limits the areas in which it will deliver cement by truck from each of its plants (R. 3926-28-31; R. 9933).

Huron also makes deliveries to customers by water from its steamship Mitchell (R. 4015, 4080, 9843), and a small volume of cement by barge (R. 9923) and to Light House tenders (R. 4081). Huron's largest boat carries close to 50,000 barrels of cement (R. 3916).

Price Policies

Huron has no fixed policy as to delivered prices or plant prices. Its policy is to satisfy the public in its demands (R. 9950). Its price policies have varied frequently from time to time (R. 4021).

When going into new territories, Huron at first observed the going prices but it gave deliveries by truck (R. 3917). Huron thereafter established its own price base (meaning plant price) at each of its auxiliary plants (R. 9824-31-40-44-47), but these price bases were never the equivalent of some other manufacturers' price base plus freight to Huron's auxiliary plant (R. 9851).

From 1926 to 1931, Huron had separate price policies for rail and truck deliveries. Delivered prices were used for shipments by railroad. Plant prices were used for truck loads, the customers taking delivery at the plant (R. 9782-3) without any restriction as to where the truck customers could carry the cement (R. 9867).

On May 25, 1931, Huron published plant prices for truck delivery for its plants at Milwaukee, Toledo, Cleveland, Buffalo and Detroit, and customers were given the option of taking delivery f.o.b. cars their station or f.o.b. trucking platform at Huron's nearest plant (App. III p. 1457). The plant prices for delivery on trucks were less than those for rail delivery, the difference being equal to the freight rate (R. 9783-5).

On March 28, 1932, Huron published prices for a 20-mile radius from Toledo, using truck rates to make delivered prices by truck and rail rates to make delivered prices by rail. From 20 to 40 miles rail rates were used for both truck and rail delivery (R. 9861). The rates quoted in the 20 mile radius were a reduction in the Toledo price. Medusa then quoted the same prices and Wabash quoted the same price f.o.b. cars that Huron had made for truck delivery. Thereafter Huron reduced its rail price to meet its own truck price (R. 9862-3).

The plant price for trucks at Milwaukee continued until August 6, 1932, when Huron established a delivered price by truck within a radius of 30 miles. This limit was extended to 50 miles on August 8, 1932 (R. 9847-8). On August 10, 1932, Huron adopted a delivered price policy within a radius of 35 miles from Cleveland (R. 9867), and later adopted a plant price which was 20¢ per barrel lower than the truck delivered price for metropolitan Cleveland (R. 9870) (App. III p. 1472). This Cleveland plant price is still in effect (at time of trial) (R. 9950).

Huron suffered certain disadvantages in making sales from its plants to customers' trucks. From 1922 to 1927, when cement was in demand around Detroit, dealers sent their trucks to the plant in the middle of the night. A line of trucks three or four blocks long would form outside the plant. Dealers with more equipment than the others would attempt to hog deliveries so that it became necessary to give out tickets in order to limit the number of trucks of a particular dealer that could get into the plant for a load (App. III p. 1434). There were peak loads in the morning and then a wait for the trucks to come back. To avoid congestion, dealers who normally picked up 5 to 20 barrels were forced to go to a heavier load and employ contract carriers. Huron decided to

do its own truck dispatching in order to level off the heavy morning demands and cut down its loading costs by eliminating their loading crew's idle time (R. 9929-30-31).

On March 10, 1933, Huron changed its general policy in Michigan of giving f.o.b. truck prices at the nearest plant. As set forth in Com. Ex. 1618, Huron on that date adopted the policy of selling from its auxiliary plants in Michigan on a delivered basis giving customers the option of taking delivery at the same delivered price either by rail to any team track or siding in the city in which the customer was located or by truck to the customer's trade area in minimum loads of 60 barrels. Truck deliveries were to be made by motor transportation company trucks operating for Huron and under Huron's supervision (App. III pp. 1426, 1457). Huron's plant clerk dispatched the trucks and Huron was thereby able to keep the packing and sacking help busy at all hours during the day. The truck companies kept several trucks standing by at all times at Huron's plants (R. 9939-40). Dealers were still permitted to send their own trucks to Huron's plants for emergency service or for quantities less than the minimum requirements for Huron's delivery or for any other reason making it advantageous for the dealer to do so (R. 9951).

There are certain advantages to the dealer who picks up his own cement. He is able to secure a smaller quantity than Huron will deliver; it enables the dealer to have Huron warehouse the cement until the dealer is ready to use it; and as Huron loads his equipment, it eliminates the expense to the dealer of loading his own equipment out of his own warehouse when making delivery to the dealer's customers (R. 9953-4).

When Huron makes delivered prices it assumes responsibility for the transportation service (R. 4018).

The public can be served better with delivered prices than by plant prices (R. 9803). There are between 2,000 and 2,200 railroad stations in Michigan. Cement rail tariffs are on file at only 30 places (R. 9804) (App. I p. 177). Purchasers taking cement f.o.b. at the mill would have to get in touch with every freight agent in his town to find out the cost at the purchaser's place. The local freight agent would have to contact the division or general freight agent and after getting the freight rate, which ordinarily is in cents per 100 pounds, the customers would have to convert it to cents per barrel (R. 9804-5). Different rates and routes may exist from the mill. At Canandaigua, New York, there are three different rates and as high as seven routes from Oswego. Between Buffalo and Canandaigua there are four different freight rates, over twelve different routes (R. 9806-7).

In nine cases out of ten, Huron's customers want delivered prices (R. 4021).

There were many exceptions to the aforesaid delivered price policy (R. 9971). F. O. B. plant prices for dealers' trucks and for scows existed in Duluth in December, 1933, and continued to the date of trial (R. 9791). These prices were lower than for rail deliveries (R. 9791; 9878) (App. III p. 1482). All trucking at Duluth is done by the customers who were allowed 10¢ per barrel trucking compensation (R. 9910). Sales were also made at Duluth f.o.b. railroad depot for L.C.L. shipments; to railroads f.o.b. carrier's tracks (Res. Ex. 2383).

At the time of the trial and for some time prior, Huron's plant price to trucks at Cleveland was 20¢ per barrel less than the truck delivered price (R. 9870) (App.

III p. 1472). Dealers outside Alpena who sent their trucks for delivery got the same price as the Alpena dealer (R. 9876). From 1933 to date of trial, sales were made to dealers f.o.b. trucks at Buffalo plant (R. 9865).

Huron has made frequent use of f.o.b. plant prices. Sales were made on that basis in Duluth (*supra* page 9). Bids and sales to the Government were often made f.o.b. plant. Huron bid f.o.b. mill for the 1937 W.P.A. Procurement, deliveries amounting to approximately 1,000,000 barrels (R. 9947-48). It bid f.o.b. mill on the so-called Good Friday invitation (R. 8967; 9788; 9947); No restrictions were made on the Good Friday or Procurement Division bids (R. 9954). It sold cement f.o.b. to the Government for Fort Brady at Sault Ste. Marie and for the Lighthouse Service (R. 9788). It sold 605,000 barrels to the Government f.o.b. railroad cars at Duluth, for shipment on Government bills of lading for Fort Peck on June 30, 1936 (Com. Ex. 329) for a total price of $860,408.31. This price was 20 cents per barrel less than the last bids made the Government (R. 3942) (App. II p. 880). It sold f.o.b. plant to Cleveland dealers after July, 1937, up to and including the date of trial (R. 9788; 9950) at less than the delivered price (R. 9916). Whenever the buyer has better transportation than Huron, it will sell at mill or lake port (R. 4081).

On January 2, 1937, Huron initiated a policy of selling at a flat delivered price throughout all parts of the lower peninsula of Michigan, the flat price being $2.10 per barrel in cloth (R. 9830). This flat price was a composite of all Huron's delivered prices in Michigan (R. 3965). In Southwestern Michigan this price was lower than the Buffington price base plus freight (R. 9851). On June 23, 1937, this price was reduced 10¢ per barrel for the counties of Wayne, Oakland and Macomb (the territory surrounding

Detroit). On August 28, 1937, Huron cut the price for the whole state, including those counties, by another 10¢ (R. 9831).

The flat price for the lower peninsula of Michigan, except in said three counties, was continued until April 22, 1938, and in said three counties until February 10, 1940 (R. 9830). The flat price plan was abandoned because it was found not to be a sound economic method of marketing (R. 9947). After the flat price was withdrawn, Huron established price bases or plant prices at its Muskegon, Saginaw and Alpena plants (R. 4003). While the flat price was in effect, all price bases in the lower peninsula of Michigan became inoperative (R. 9947) (App. I pp. 590-3).

While the Michigan flat price was in effect, Huron continued to quote lake plant prices plus freight outside the State of Michigan (R. 3967). The territories in which Huron's plant prices were effective as of June 30, 1937 are shown on the map of the United States, Respondents' Exhibit 2388.

The average level of prices in the territory in which Huron sales predominate is lower than the price level anywhere else in the United States (Res. Ex. 2388, R. 8850, R. 9961) (App. III p. 1708). In December, 1936, delivered prices in Michigan were 20¢ to 30¢ lower than in surrounding states (R. 8850).

Freight Rate Books

Huron operates a traffic department as an adjunct to its sales department. Mr. Meyers, its traffic manager, had previously been in the traffic department of the Michigan Central R.R. (R. 9776) and was the originator of its tariff (R. 9778). Huron has on file between 175 and 200

freight tariffs issued by the various railroads (R. 9776). It has access to transcontinental tariffs at the Detroit office of such roads as the Great Northern and Northern Pacific (R. 9777).

At one time it had one copy of The Cement Institute Freight Rate Books for some of the states in which Huron did business. These copies were kept in the Detroit office and were not lodged with the managers of Huron's eleven plants (R. 9777). Cutler, Magner Company, Huron's Northwestern sales representative at Duluth, who made Huron's prices for Northern Wisconsin, Minnesota, and North and South Dakota, did not have the Institute's rate book (R. 9781).

The Institute's books were never used to determine prices (R. 9778). Huron had its own rate books prepared from the railroad tariffs (R. 9899) and these were furnished to its salesmen (R. 9779) and used in pricing (R. 9781).

Huron established a new price base in Muskegon by quotations mailed out on November 16, 1935 (R. 9829). These quotations reduced the price in Western Michigan by amounts ranging from 1¢ to 20¢ per barrel (R. 9829). Rates from Muskegon were included in Huron's freight rate books but not in those of The Cement Institute until after Huron had published its Muskegon prices (R. 9779-80).

Huron at times did check its freight rates against the Institute's (R. 9780) but in case of variation never changed its rates to use the Institute's rates (R. 9781).

Relations With Competitors

There are no inter-company relationships between Huron and any other respondent (R. 3903-15982).

Huron did not become a member of The Cement Institute until June 15, 1933 (Res. Ex. 2173 A-B) (App. III Chart p. 1800) (after the N.I.R.A. was enacted) and resigned January 14, 1939 (R. 9944). The Code of Ethics of The Cement Institute was cancelled when Huron became a member (Com. Ex. 605 C.).

Prior to the N. I. R. A. period, Huron had never held any conferences with competitors to discuss selling policies (R. 9955). During the NRA Code period, Huron filed its prices with the Code Authority but discontinued filing its prices on May 27, 1935, the date the N.I.R.A. was held unconstitutional by the Supreme Court (App. II p. 696). No price or practice agreements were arrived at by Huron at any district meetings held during the NRA Code period (R. 9944).

Both before and after the NRA Code period, Huron frequently changed its price bases at its various plants (Res. Ex. 2389) but did not do so by agreements with competitors. Huron was at all times free to change its price bases whenever it saw fit to do so and competitors could do likewise (R. 4066-7). Mr. S. T. Crapo (Vice-President and Secretary of Huron) never got around any group that talked bases (R. 3914).

There was no agreement or consultation among cement manufacturers about Huron establishing the flat price in Michigan in 1937. Huron did not inform its competitors in advance of its intention to do so. There was no agreement or consultation among cement manufacturers to discontinue using the flat price in Michigan (R. 8844-5; R.

4025). There was no agreement that Huron should be the price leader in the Michigan area (R. 11770).

No agreement was made between the various mills regarding trucking limits (R. 4020). No agreement as to trucking practice was ever reached with Aetna (R. 9945).

Marquette and Huron were the worst competitors of Universal Atlas in 1932 in the middle west (R. 10390-1). Universal Atlas saw its business in the Oswego, New York, territory dwindling because of the movement of cement by Huron by truck from its warehouse until it put in a warehouse there (R. 10488).

Edison could not meet the competition of Huron which trucked cement from its plant at Oswego into the counties of Oswego, Wayne, Cayuga and Jefferson, New York, and it ceased soliciting business in that territory (R. 10737).

Bessemer was forced to withdraw from the Cleveland market in 1931 because of the prices established there by Lehigh and Huron (R. 4044).

Lehigh found Huron making quotations in 1931 for delivery by truck at Buffalo to which point Huron supplied cement by water from Alpena, Michigan. Since then Lehigh has delivered to trucks at its Buffalo mill. Huron's establishment of auxiliary plants affected Lehigh's position quite severely and led Lehigh to provide more effective means of dealing with competition than by continued rail shipments. Huron's sales by truck around Oswego cut sharply into the good dealer business Lehigh had built up, and in 1938 Lehigh established warehouse facilities there to hold those customers and meet Huron competition (R. 7913-4). In 1931 Lehigh established a warehouse at Milwaukee to deal with trucking competition by Huron and others. That business was

severely affected and dwindling and Lehigh decided it would endeavor to hold its business (R. 7918). The situation at Cleveland, Buffalo and Oswego was simply one on Lehigh's part of meeting competition established by Huron (R. 8058).

Huron is a dominant factor and price leader in the trade territory of Aetna (R. 8838-49). The profits of Aetna were not satisfactory and in December, 1936, Aetna tried to increase the price 10c. Huron did not follow but lowered the price (R. 8849-52).

Federal's main competitors were Lehigh and Huron in Buffalo, where Federal battled every day to secure business (R. 8960). Huron established a price base at Buffalo, lower than the one previously established by Lehigh. Federal was practically eliminated from the Oswego market by the trucking service Huron gave its customers (R. 8982-3) and voluntarily took itself out of that market because it could not compete with what Huron was doing (R. 9034).

Since 1932 North American has loaded trucks to meet competition initiated by Huron at Oswego (R. 10006).

Penn-Dixie met the competition of Huron in 1937, when Huron extended trucking operations from its Oswego plant into additional counties and at the same time reduced its truck delivered prices. Later Alpha met this competition from its Jamesville plant. Penn-Dixie met this competition and extended its trucking operation. (R. 11563).

Petoskey competes with Huron in Michigan. Petoskey has never agreed with other cement manufacturers that Huron would be the price leader in the Michigan area (R. 11769-70).

A witness for the Commission testified that Huron carried its cement from its plant in Michigan by its own boat to Toledo and Cleveland (and other lake ports). That made it difficult to compete in those communities owing to Huron's low cost of delivery of cement from its mill to those points (R. 4311).

Huron has never established a price base (punitive base) on a competitors mill (R. 9951-2).

Huron has no direct interest in imported cement as none has been sold in its territory in recent years (R. 9949) (App. IV p. 2624).

ARGUMENT

So that the Court will not be burdened with excessive or repetitious arguments, this brief is largely confined to matters relating specifically to Huron. Accordingly, we adopt the arguments of other counsel in the related cases Nos. 23-34 insofar as they do not conflict with or detract from the position which Huron takes in its case. We disagree with a number of legal conclusions advanced by counsel for the Commission, particularly with the proposition that the Federal Trade Commission has power to suppress violations of the Sherman Act, a subject ably covered in the brief of Edward A. Zimmerman, counsel for Marquette, case No. 25, whose argument we adopt on that point.

I.

THE COMMISSION MADE NO FINDING THAT HURON WAS A MEMBER OF, OR JOINED IN OR PARTICIPATED IN MAINTAINING A COMBINATION TO RESTRAIN COMPETITION IN THE PRICE OF CEMENT

This is not a price fixing case. There is no Finding that respondents entered into any agreement to fix prices and we do not understand that the Commission makes any such claim. The Commission charged respondents with having combined in a nationwide conspiracy to restrain competition in the price of cement. While the Findings recite a number of trade practices relating to individual action on the part of some respondents, yet the Findings do not specifically determine such individual action to have resulted from agreement or combination. The charge of the Commission is not supported by any Finding of the Commission.

The lack of a specific Finding of combination is particularly noticeable in respect to Huron. There is no Finding by the Commission which determines that Huron did anything of which the Commission complained. The Commission made a total of 212 separate Findings, divided into 26 numbered paragraphs and occupying 172 pages of the printed Record, yet the Commission made only one specific Finding as to Huron (Par. One 2 (f) R. 15968) wherein the Commission found in substance that Huron is a Michigan corporation of Detroit, Michigan, with its principal plant located in Alpena, Michigan, from which plant the ten auxiliary plants (naming them) are supplied. Also that Huron markets the cement manufactured by Michigan Alkali Company at Wyandotte, Michigan, and became a member of The Cement Institute in June, 1933. Had there been substantial evidence that Huron violated any of the anti-trust laws, the Commission certainly would have made a Finding to that effect.

Huron and others are involved in this case only because they were at one time members of the Cement Institute; not because of anything they have done in combination to violate the anti-trust laws. This is the clear cut opinion of the Circuit Court of Appeals (Opinion, R 16769), stated as follows:

> "If our construction of this paragraph (3) is correct, it means that the charge of combination is little more than a pretense to get all the members of the industry, leaders and followers alike, into the same proceeding and before the same court."

An inference of combination or conspiracy is not justified or controlling when the positive and direct evidence is to the contrary. The Statement of Facts in this brief constitutes positive and direct evidence that Huron was

not a party to any combination. References to the Statement of Facts, supplemented by additional references to the record, will explain why the Commission did not make any Finding to that effect, and why it could not have done so with propriety.

Averson to Competition

The Commission found (R. 15983) that the cement industry has evidenced a strong averson to free competition, and many Findings are doubtless intended to support such an inference. Such an inference is not justified as to Huron. The Statement of Facts demonstrates that Huron, throughout its entire existence, has carried on a program of expansion in plants and marketing facilities; has initiated and taken advantage of economies in the handling and distribution of cement and has conducted its business in a highly competitive and independent manner. This could hardly be disputed in view of the fact (*supra* p. 11) that the average level of prices in the territories where Huron sales predominate (viz: around its eleven plants) is lower than the price level anywhere else in the United States.

Huron's competitive and independent business practices are otherwise proven throughout the Statement of Facts. We need only mention the enlargement of its mill capacity, the broadening of its markets by plant expansion, the building of its own lake steamers for the economical transportation of cement in bulk to its ten lake port plants, and from originally serving only the sparsely settled area around Alpena, Michigan, Huron has grown and now serves consuming markets on all the American shores of the Great Lakes (*supra* p. 5). Such physical facts require no elaboration.

The reason why the average level of Huron's prices at its eleven plants is lower than anywhere else in the United States is obvious from the Statement of Facts. The transportation of cement in its own lake steamers from its mill to its marketing plants (cheaper than by public lake freighter or by rail for long haul); the economical packaging and handling of the cement in its specially designed and equipped plants and the delivery of cement by trucks (cheaper than by rail up to 40 miles), present a combination of economies of Huron which no cement producer has been able to better (*supra* pp. 4, 5).

The effect of this combination of economies upon competition is set out in the Statement of Facts (*supra* pp. 14-16). The main objective of Huron's competitors was to meet Huron's competition and preserve their dwindling business. Two competitors would not meet the competition and withdrew from the Oswego territory. If Huron's competitors would go to the extremes indicated in the Statements of Facts, it cannot be said that they did not compete with Huron. Nor can it be denied that Huron was engaged in genuine competition with them. Because of its ability to compete for business, Huron is now, in the territories it is able to serve, an established factor in the cement industry. In no way other than by strong competitive practices could it have attained that status in this highly competitive business.

Trucking

One of the Findings intended to support the alleged aversion to free competition, deals with the efforts of organized dealers, railroads and some respondents to eliminate or discourage the trucking of cement (R. 16045-54). It is quite logical that they should do so, for trucking cut into their business. But Huron is primarily a

trucking company. In going into new markets, Huron designed its plants for the economical loading and use of trucks. Its deliveries by trucks increased from 38.6% of all deliveries in 1925 to 74.2% of all deliveries in 1938. In the latter year, truck deliveries in Detroit and Saginaw reached 98% of all deliveries in those areas (*supra* p. 5). If the effort to eliminate the delivery of cement by trucks is relied upon as being one of the elements of a nationwide conspiracy to restrain price competition, as the Findings indicate, Huron (and other companies) can be no part of it.

Uniform Prices

Another series of Findings of the Commission (R. 15988-16006) relate to uniform delivered prices resulting from the use of a so-called multiple basing point "system." The insufficiency of such findings to support a charge of combination or conspiracy is fully covered in briefs of other respondents. We will deal only with the reasons why none of these Findings are applicable to the price policies of Huron.

Huron has never adhered to any standard or fixed policy of quoting prices. Its policy has been to satisfy the demands of the purchasers. It made plant (base) prices at each of its eleven plants but these were never the equivalent of some other manufacturers' price base plus freight to Huron's plant, which is the antithesis of any method related to the socalled multiple basing point "system" of pricing as described by the Commission (*supra* p. 6). It appears from the Statement of Facts under Pricing Policies (pp. 6 to 11) that Huron priced cement in many different ways from time to time, obviously experimenting in ways and means of securing business, and that Huron was at all times entirely independent in its methods of pricing cement. Prior to March 10, 1933, Huron had

separate prices for truck and rail deliveries, f.o.b. plant prices and delivered prices; optional prices at the election of the customer; different truck prices for different distances and variations in its delivery services (*supra* pp. 6 to 8).

It was not economical for Huron to continue its general policy of permitting customers to take delivery at the plant in their own trucks (*supra* p. 7) although the practice has never been entirely discontinued. Huron's customers generally wanted delivered prices so they would know definitely what the cement would cost when they got it. Consequently, on or about March 10, 1933, Huron adopted a policy of selling cement from its nearest auxiliary plant on a delivered price basis, with optional rail or truck delivery (*supra* p. 8). While that became Huron's general policy, Huron continued to sell and still sells to dealers' trucks, to scows and lighthouse tenders and to the Government at f.o.b. plant prices (*supra* pp. 9, 10).

Such pricing and trade practices conform to no "system" or pattern. If they did, and if they were not highly competitive, the average level of prices in the territories around Huron's eleven plants on the Great Lakes would not be lower than anywhere else in the United States. Shortly before the Commission filed its complaint in July, 1937, delivered prices in Michigan were 20c to 30c lower than in surrounding states (*supra* p. 11). When the resultant prices of Huron are considered along with a total lack of agreement, understanding or consultation between Huron and its competitors as shown in the Statement of Facts (*supra* pp. 13, 14), it is inconceivable how the Commission can justify an inference that Huron was in a combination to restrain price competition.

Identical Bids.

The Findings of the Commission state that "sealed bids made to public agencies" are the best illustration of the production of "identical" delivered prices by respondents (R. 16023) and abstracts of a number of such bids are set forth (R. 16024-8). These are the instances referred to by the Commission in its brief at page 92 whereby the Commission specified and identified numerous respondents as participating in the acts by which the alleged combination was effected. In only one of these bids was Huron a bidder (R. 16025) being bids by the producers for 600,000 barrels in bulk and 10,000 barrels in sacks for the Fort Peck dam in Montana.

The Fort Peck bids were opened July 25, 1935 (R. 16025) during the period of immunity granted by NIRA, viz: within 60 days after the termination of the Act. Obviously the bids were called for and were made some time before that date. The bids are delivered prices based on land grant rates which produce the decimals as demonstrated in the briefs of counsel for other respondents. Regardless of the immunity of the NIRA, any evidential importance of this isolated instance, as bearing on concerted action to effect "identical" delivered prices, is completely removed and loses its substance by subsequent events.

Pursuant to negotiations which followed said bidding, Huron made a contract (Comm. Ex. 329) with the War Department without competitive bidding for 605,000 barrels for the Fort Peck dam, F.O.B. railroad cars at Huron's plant at Duluth, Minnesota, at a flat price of $860,408.31. This price is 20c per barrel less than the bids for the same cement for the same job opened July 25, 1935, last above referred to (*supra*, p. 10).

There can be no inference of concerted action by Huron with others in this transaction for any purpose whatsoever. The sale was an F.O.B. plant price, not a delivered price. The Government received the benefit of the land grant rates. Huron made a single-handed, private transaction with the Government for the sale of cement.

Since this is the only "sealed bid" instance in which the Findings refer to Huron, other matters on this subject are left to other counsel for discussion.

Freight Rate Books

The Findings of the Commission (R. 16006-22) regarding the use of the freight rate books of The Cement Institute by some of the corporate respondents for pricing purposes, have no application to Huron in any way. Huron never used the Institute's freight rate books to determine its prices. Huron had its own rate books which its own traffic department prepared from the railroad tariffs and which its salesmen used in quoting prices (*supra* p. 12). Even though Huron, in June, 1933, became a member of The Cement Institute (to comply with NIRA) it never, as a member, used the Institute's rate books for pricing and was not required to do so. The Commission attaches great importance to the use of the the Institute's rate books as evidence of a combination to restrain price competition. Such reliance by the Commission demonstrates the fallacy of the charge against Huron and other cement producers who never used the Institute's rate books for pricing.

In a foot note of the Commission's brief (p. 70) is a statement that on November 18, 1935, Huron established a base price at Muskegon, Michigan, and on the same day the Institute issued freight rates from Muskegon which

it had never done before, citing R. 9779. The reference should be to the following page of the record (R. 9780) where the accurate facts appear. On November 16 Huron issued and mailed the quotations of prices and these quotations were in the hands of the trade not later than November 18. On November 20 Huron received an amendment (dated at Chicago November 18) to the Institute rate book. Although Huron had no plant at Muskegon in 1935, it was selling and delivering cement there from its vessel, "The Mitchell," which Huron used like a warehouse until its plant was constructed at Muskegon (R 4014-5).

Specific Job Contracts

The Findings of the Commission regarding specific job contracts (R. 16059-65) do not relate to Huron as it was not a member of The Cement Institute prior to the NIRA period and is not shown to have been connected with such matters.

Punitive Bases

The Findings of the Commission regarding the establishment of punitive bases on the mills of others (R. 16020-45) likewise do not relate to Huron. The record shows affirmatively that Huron never imposed a punitive base on another mill or plant and never even established a price base on a competitor's mill nor a plant price based on a competitor's mill plus freight (R. 9951-2).

Diversion in Transit

The Findings of the Commission dealing with efforts to eliminate diversions of cement in transit (R. 16055-59) are not intended to apply to Huron. No dealer or pur-

chaser of Huron ever diverted a rail shipment (R. 9798). There were occasions when truck loads were taken at the plant by outside dealers who, instead of taking them to their own business location, peddled the cement in a local dealer's town (R. 9802) and thereby injured the local dealer's business. Such a practice is considered fraudulent. That was one factor in Huron's decision to take over the dispatching of the trucks (*supra* p. 8).

Boycotting

The Findings relating to the boycotting of dealers handling foreign cement (R. 16102-4) only purport to affect respondents in seaport cities. Huron has not done that: No foreign cement has been sold in Huron's territory in recent years and Huron has no interest in this question (*supra* p. 16).

Other Findings

The Findings of the Commission as to the activities and policies of respondents dealing with (1) Terms and Conditions of Sale; (2) Qualifications of Dealers and the Classification of Customers; (3) the Collection and Dissemination of Statistical Data and other incidental matters, are fully discussed in the brief of Donovan, Leisure, Newton & Irvine. We wish to note that Huron introduced its sales contract forms in evidence which show numerous modifications (Res. Ex. 2394 A to Z 52); that Huron was not a subscriber to the Mallory statistical service after July 1, 1932 (Com. Ex. 3008 A-C); that Huron did not answer the Clark and Burns questionnaire promulgated by The Cement Institute (R. 16120); the Code of Ethics of The Cement Institute was not in existence when Huron became a member or thereafter, and that nowhere in the Findings is there any reference to Huron collaborating

with other cement producers in respect to any of those subjects.

It will simplify the consideration of the inapplicability to Huron of a large part of the evidence in the record and Findings, if it is kept in mind that Huron was not in existence prior to 1907 (R. 3904); that it was not a member of the Association of American Portland Cement Manufacturers prior to 1911 (Comm. Ex. 3235 Z 83-108) nor of the Cement Institute from the date of its organization to June 15, 1933 (Res. Ex. 2173 A-B). Related matters occurring prior to those respective years have no significance as to Huron. Furthermore, Huron was never a member of the Cement Manufacturers Protective Association or of the Association of Licensed Cement Manufacturers. (App. III 1790, 1794).

The Commission formulated and filed its complaint, charging combination and conspiracy, as a result of its ex parte preliminary investigations. Our view of the Findings of the Commission leads us to the conclusion that when the Commission had made its entire record, it realized the situation was different than it had previously assumed. Competitive conditions became obvious. Lack of substantial evidence of combination as to Huron and others was insurmountable. Therefore, the Commission could not, with propriety, and did not make a direct Finding of any combination or conspiracy between Huron and other members of the industry. The cease and desist order is directed against an "assumed" combination regardless of the fatal omission of a Finding that there was one.

II.

THE PRICING AND TRADE PRACTICES OF HURON DO NOT JUSTIFY AN INFERENCE THAT HURON WAS A PARTY TO ANY CONSPIRACY TO RESTRAIN COMPETITION IN THE PRICE OF CEMENT

Counsel for the Commission in their brief filed in the Circuit Court of Appeals below at page 234 made the following statement:

> "It is true that Huron has in the past evidenced tendencies toward independence, but those tendencies have been increasingly curbed so that, beginning with the NRA Code period, it fell into step with its confederates who posed as its competitors and has since then participated in and supported their combination to suppress price competition."

Huron became a member of The Cement Institute on June 15, 1933, only to comply with the National Industrial Recovery Act. This statement of counsel means that Huron is claimed to have joined in a conspiracy because it complied with this Act of Congress.

During the NRA Code period no cement producer was permitted to be independent as a matter of law. The above concession of counsel exonerates Huron because of its independence prior to the NRA Code period. The evidence of Huron's pricing and other trade policies, as shown in the Statement of Facts, and as pointed out below, shows conclusively that Huron was independent of its competitors after the NRA Code period as well as before.

The Statement of Facts (*supra* pp. 6-11) contains in some detail the diversity of pricing by Huron which has no relation to any so called multiple basing point system of pricing as described by the Commission. Those

facts, being undisputed, are positive evidence of the opposite of any system or uniform method of pricing and of Huron's complete independence in pricing throughout its existence.

When on March 10, 1933, (shortly prior to the NRA Code period) Huron changed its general price policy to one of selling cement from its auxiliary plants on a delivered price basis, it had economic reasons for doing so, viz: to control the loading and dispatching of trucks in its own or hired trucks and reduce its operating costs. It was also done to satisfy the demands of its customers (*supra* p. 9). But as the Statement of Facts shows this was not an exclusive policy, for Huron continued to sell at f.o.b. plant prices or with allowances for trucking compensation. Whenever the buyer had better transportation, Huron sold at plant or lake port prices (*supra* p. 10). This diversity from any fixed price policy continued to the closing of the proofs in this case.

After the NRA Code period and in November, 1935, Huron established a new price at Muskegon, Michigan, which reduced the price in Western Michigan by amounts ranging from 1c to 20c per barrel. In 1935-6, Huron enlarged its Saginaw, Michigan, plant and in June, 1936, reduced its Saginaw price (R. 9829). About that time a trade war in the Saginaw-Bay City area broke out between Aetna and Wabash due to an alleged hi-jacking of a contract by Aetna from Wabash (Ex. 909) (App. III pp. 2169, et seq.) which affected the prices during the balance of the year.

The contract entered into between Huron and the War Department (Comm. Ex. 329 A-Z) on June 30, 1936, for 605,000 barrels of cement for the Fort Peck dam at a price 20c below the previous bids, delivered F.O.B. railroad cars at Huron's plant at Duluth, as fully set forth

above (*supra* p. 23), is an illustrative example of Huron's complete independence of its competitors who had previously bid for this contract.

On January 2, 1937, Huron initiated a flat delivered price for the entire lower peninsula of Michigan, the price being a composite of all of Huron's delivered prices in Michigan. In the summer of that year the flat price was reduced. This flat price continued in the territory around Detroit until 1940. While this flat price was in effect, it wiped out all price bases of others in the State of Michigan. The flat price was abandoned because it was found not to be a sound method of marketing (*supra* pp. 10, 11). This is undisputable evidence of Huron's continued independence and competitive practices.

After the NRA Code period Huron ceased filing its prices with the Code authority and resigned from The Cement Institute on January 14, 1939. It frequently changed its plant or price bases at its various auxiliary plants whenever it saw fit to do so (*supra* p. 13). In addition to the enlargement of its Saginaw plant in 1935-6, Huron built a new plant at Muskegon in 1937, and a new plant at Green Bay, Wisconsin, in 1938 (*supra* p. 4).

Both before and after the NRA Code period officials of Huron never had any conferences with competitors to discuss selling policies or agreements regarding the various changes in price bases by Huron and never had any group talk about bases (*supra* p. 13). This lack of agreement and consultation applied to Huron's flat price in Michigan and its discontinuance (*supra* p. 13). Huron had no agreements with competitors regarding trucking limits or trucking practices (*supra* p. 14).

In 1937, Huron extended trucking operations from its Oswego plant into additional counties and at the same

time reduced its truck delivered prices. Alpha and Penn-Dixie had to meet this competition (*supra* p. 15).

These proven and undisputed facts should be sufficient to establish Huron's complete freedom of action and independence in pricing and practices right up to the hearing of this case before the Commission.

III.

THE EVIDENCE REFERRED TO BY COUNSEL FOR THE COMMISSION DOES NOT JUSTIFY AN INFERENCE THAT HURON CONSPIRED TO RESTRAIN COMPETITION IN THE PRICE OF CEMENT

Preliminary Statement

The Commission's brief contends (p. 93) that the court is not required to make a detailed review of the evidence applicable to Huron (and 12 other respondents) to determine whether the evidence is sufficient to connect each of them with the alleged combination. Counsel asserts that mere membership in the Institute, if it was engaged in an unlawful enterprise, plus the fact that their pricing practices do not vary significantly from the pricing system used by *the* other respondents, are sufficient to support the Commission's Findings and Order. Whether the Institute was so engaged is fully covered by briefs of other counsel. Whether the pricing practices of Huron do or do not vary significantly from the pricing policies of *the* other respondents, would require a detailed review of the evidence. Huron's pricing policies are linked inseparately with its trade practices, including trucking; they do vary significantly from the policies of most of the other members of the industry. In their entirety, they probably vary significantly from the policies of all the respondents. This brief is partly intended to demonstrate that fact.

Below at page 96 of their brief, counsel states that the act of joining the Institute, coupled with subsequent adherence to the pricing system, is tantamount to an explicit agreement to maintain the system. Under circumstances, not here present, we might agree, assuming the Institute was engaged in an unlawful enterprise, and with knowledge of that fact, Huron voluntarily became a member. But Huron did not become a member of the Institute with any such knowledge nor voluntarily. It may fairly be said that Huron was compelled to join the Institute because it was the representative of the industry under the National Industrial Recovery Act, by direction of Congress and the President of the United States. It also may fairly be said that during the NRA Code period, the Institute was not an association of members but a type of Government agency. After the death of NIRA, Huron did not use the facilities of the Institute (R. 9778-9944), whatever they were.

The other factor of the Commission's theory of agreement is adherence to the alleged illegal "system" allegedly sponsored by the Institute. Huron's general pricing policy which was maintained after its so-called membership occurred, was adopted by Huron before it became a member (*supra* p. 8). Its changes in pricing policies thereafter were not influenced by the Institute's Compendium which had nothing to do with pricing policy. Huron's Michigan flat price (*supra* p. 10), established when Huron was a member of the Institute, wiped out all so-called base prices or price bases of others in the lower peninsula while that type of price was in effect. Certainly that is the opposite of adherence to any "system." Huron's contract with the War Department for a large amount of cement, sold F.O.B. Huron's plant at Duluth at a price 20¢ per barrel lower than the previous sealed bids (*supra* p. 23), made while it was a member of the Institute,

likewise should dispel any inference that Huron adhered to any such alleged system of delivered prices in concert with other members of the Institute. These two instances of non-adherence to any "system" together with the other instances recited above (*supra* pp. 28-31) reflect Huron's status on this subject from shortly after the expiration of NIRA to the close of the hearing before the Commission.

But the Commission refers to evidence of other matters to which we should give attention in order to aid the court in arriving at a correct understanding of its import.

Inadmissible evidence

In addition to the evidence of matters occurring during the NRA Code period, fully covered in other briefs, the Commission argues for the admissibility of the Treanor letter (Comm. Br. p. 86). Mr. Treanor's letter shows on its face that he knew nothing about conditions around the Great Lakes where Huron sells most of its cement and the letter is an *ex parte* expression of an erroneous opinion by a third person so far as Huron is concerned. In the Great Lakes areas the cement industry has demonstrated that it can stand competition and not be ruined thereby (*supra* pp. 14-16). Huron has expanded its business in highly competitive markets where the average prices are the lowest in the country (*supra* pp. 4, 11).

Evidence of Concerted Action

The Commission's brief (pp. 69 to 80) summarizes the Commission's Findings of alleged concerted action on the part of respondents in respect to eight matters which action, in the absence of an express agreement, is asserted to be sufficient to justify an inference of agreement.

We have shown, (*supra* pp. 19-26), that Huron was not in concert of action in respect of any of those eight subjects.

The Commission brief at page 100 refers to the testimony of Huron officials as indicating that sales to customers' trucks at one of its plants were frequently made at prices equivalent to the delivered price, referring to three pages of the record. The statement is correct as being applicable to a period before Huron became a member of the Institute as well as after the NRA Code period. No change was made during the Code period (R. 9880; R. 9954). But any inference that it was done by concert of action with others or to support any pricing "system" of others has no foundation. Such instances mostly refer to sales to customers' trucks for emergency service or for quantities less than the minimum load (*supra* p. 8). The delivered price compensated Huron for its additional handling and loading costs for small quantities. The dealer saves considerable inconvenience and expense by picking up his own cement (*supra* p. 8).

At the same page 100 of this brief, counsel state that Huron based its contention below that it did not employ the "delivered price system," on the fact that it sold cement on the basis of truck delivery. Our contentions below, made in our brief, are substantially the same as in this brief and no such contention will be found here.

At page 101 of their brief, counsel claims there is substantial evidence of the part played by Huron in agreements to restrict the territory in which trucking would be allowed with references to the record. The fact is that no agreements regarding trucking limits were ever made by Huron (R. 9945). We think the best approach to this subject is to narrate the testimony, most of which is in

the record referred to in support of the above statement.

(a) When Huron entered new markets at the various lake ports, there was comment and criticism from the nearest mills (R. 3921-2). The fundamental objection was that a truck delivers on the job and rail delivers to the nearest side track. Truck delivery is more economical to the contractor (R. 3925).

(b) Huron has always limited its trucking at all places inside of practical trucking limits, viz: to certain territories which it specifies. The criticism was met by putting certain limits on trucking (R. 3926). Trucking was not popular with mills which made delivery only by rail (R. 3927) and at some places they suggested theories of limiting truck movement to specified territories. Although Huron put in certain limits at places, the criticism did not cease and will never cease, in the opinion of Mr. Crapo of Huron, but the purpose of being a good neighbor was accomplished (R. 3929-30).

(c) Trucking limits were extended which also created a lot of criticism. In Toledo, Huron at first drew back its limits and then extended them again (R. 3931-2). At some places there were no suggestions for limits from competitors (R. 3936-7).

(d) Mr. Crapo of Huron was fearful if limits were not drawn in and explained (R. 3957) that when there is a difference of opinion with a big powerful competitor, he always has a little fear as to where they are going to hit you. But there was no agreement which brought about the final action Huron took, nor understanding which brought about the change. When there was too much pressure, Huron drew in the limit and then changed it again (R. 4020-1).

The foregoing covers the substantial testimony of Huron's officials on that subject to which the Commission brief refers. The evidence reflects an ordinary business effort on the part of Huron to avoid reprisals and price wars. It reflects business antagonism between Huron and its competitors. It rebuts any inference of combination.

The Commission also refers to Ex. 417-CC in support of its said claim of agreements to limit trucking. The exhibit is a letter written by Aetna to Huron dated June 28, 1935, quoting from a letter Aetna had written a Mr. Stone on June 12. It referred to statements made at a meeting in New York some time previous and gave Aetna's answer to Mr. Stone to those statements. "CC" is the 3d page of the letter. We refer to the whole letter. It merely shows that complaints had been made that Aetna violated the NRA Code. In some respects the violations were admitted. The page lettered "CC" refers to the complaints of Universal regarding Aetna's trucking, part of which it calls gossip, but the letter admits Aetna went outside the trucking radius on two occasions in Wisconsin. A map is enclosed showing trucking areas which clearly are a part of the terms and conditions of sale and affected prices filed under the N. R. A. Code. It has no value as evidence that Huron agreed to restrict territory in which trucking would be allowed.

Ex. 2202, also referred to by the Commission, is a plain sheet of paper dated March 12, 1935, which lists counties around Milwaukee, Manitowoc and Green Bay. The making of trucking areas is a necessary part of making prices. There is nothing peculiar about it and there is nothing to be inferred from doing so. The natural limits beyond which it is not economically sound to make truck deliveries is 40 miles (*supra* p. 5). Beyond 40 miles the rail rate is less than for truck (R. 9933).

The Commission further refers to R. 16051 which is a part of Finding 11(e) relating to the efforts on the part of railroads and others to eliminate trucking. This is referred to above in this brief (*supra* p. 20). Subsequent to the report of Mr. Brister of the New York Central in 1931, which is the part referred to by the Commission, it was reported at a meeting of railroads and builders in January, 1932 (R. 16053) that *initial* steps have been taken to have the cement traffic returned to the rails in the Lake front district, principally at Buffalo, Cleveland, Toledo, Detroit (all being Huron areas) and Chicago. The continuation and expansion of trucking by Huron thereafter (*supra* p. 5) was Huron's answer to the railroads and others. Yet the Commission cites this part of the Finding as evidence of action on Huron's part to support the so-called multiple basing point system (Com. Br. p. 101).

Lastly the Commssion refers to Finding (10(i)), as evidence of other action on the part of Huron to support the so-called mulitple basing point system. This is a long Finding (R. 16040 to 16045) but it may be briefly summarized.

(a) The Finding starts off with the statement that in one case failure to conform to respondents' pricing and marketing practices had results of a personal nature to the executives of the company concerned. The company concerned is Aetna, not Huron. The executives of Aetna, the Sales Manager and General Manager, were removed by the President of Aetna three years later. If this is a Finding of anything, it is a Finding relating to Aetna.

(b) In September, 1933, it seems that Aetna had hijacked a contract from Wabash and in retaliation, Wabash imposed a punitive base on Aetna at Bay City, Michigan (R. 9827). Partly because of this, and partly because the industry was then working on the NRA Code and had

some fundamental matters to discuss (R. 768), a conference was had in Detroit in October, 1938, between five members of the industry and Mr. Johnson, President and Mr. Cree, Sales Manager, of Aetna. Rooney of Huron was invited to attend and was an interested bystander, with nothing to say. Prices were not discussed (R. 9964-6). The Finding sets forth an inter-office communication from Mr. Johnson to his General Manager, reciting the fact of this conference and certain agreements which he and his Sales Manager had made (R. 771) with the others so that "all trouble caused by chiseling will be eliminated." Mr. Johnson wrote his manager as he did because of poor merchandising (R. 768).

(c) Another meeting was had in December, 1935, between the President, General Manager and Sales Manager of Aetna, and eight members of the industry. What occurred at this meeting is best described by the testimony. No agreements whatever were reached (R. 11798; R. 10150-1). Apparently it was an occasion created by Mr. Johnson to castigate his management in the presence of others whom he had invited (R. 11882). The Finding recites excerpts of another inter-office communication regarding this meeting which do not accurately reflect what happened. The references to several cities, such as withdrawing from Detroit, relate to whether Aetna would continue to have warehouses at those places.

(d) The Finding recites that in the spring of 1936, a new dispute arose between Wabash and Aetna and a punitive base was again imposed at Bay City by Wabash in June 1936 (R. 16044). There follows a letter from Mr. Crapo of Huron to Mr. Johnson of Aetna written in July 1936, in which Mr. Crapo states that he believes Aetna had hi-jacked another contract from Wabash with the same result, an act which Mr. Crapo regretted.

If there is any substantial evidence in this Finding of any action on the part of Huron to support a combination, we fail to see it. Mr. Crapo's only interest in the Aetna-Wabash price war was to protect Huron's net profits at its Saginaw plant which were affected by the price war at the twin city of Bay City where the same price prevails (R. 3944-58).

The foregoing references to the record are all the evidence which the Commission has pointed out as justifying an inference that Huron was a party to a conspiracy. Much of the record referred to could not be dignified as evidence. None of it could justly be said to be substantial evidence. But in the face of all the positive and undisputed direct evidence to the contrary, as pointed out above, no wrongful inference of concerted action by Huron with others, as charged, is justified.

IV.

THE COMMISSION MADE NO FINDING THAT HURON COMBINED OR CONSPIRED TO DISCRIMINATE BETWEEN PURCHASERS IN PRICING CEMENT

The issue under Count II of the Complaint of the Commission is whether the combination or conspiracy alleged in Count I of the Complaint (if found to exist) resulted in the respondents engaging in unlawful discrimination in price between its customers. (See Opinion below R. 16763).

If Huron is not found to have combined or conspired under Count I, there is no basis for the Commission's order to cease and desist in respect to the matters covered by Count II. Huron's individual pricing methods and practices which are not the result of combination or conspiracy with its competitors are not involved in this case.

The question of price, viz: whether price is the delivered price paid by the purchaser or the so-called "mill net" realized by the seller, and other points not herein discussed, are fully covered in other briefs. It may be noted that throughout the Findings of the Commission and the brief of counsel relating to Count I, "price" is the delivered price. The Commission does not claim that delivered prices are illegal. The complaint is that it is illegal for sellers of cement to combine to maintain a multiple basing point "system" which causes uniform delivered prices. If the Court finds that Huron was not in such a combination, this charge fails along with the charge in Count I.

There is no evidence or claim that Huron sells cement to any dealer or contractor at any different price than to any other dealer or contractor in the same trade area where the dealers compete with dealers and the contractors compete with contractors. The charge is that delivered prices are uniform, so there would be no discrimination in the price of the cement among such competitors. While the delivered prices are different in separate areas where different factors enter into the price, the dealers and contractors in one area do not compete with dealers and contractors in any other area, their business being local.

To call Huron's act of delivering cement to customers' trucks at its plant and charging the delivered price therefor (discussed *supra* p. 34) a flagrant price discrimination (Com. Br. p. 108-9) is beyond our understanding. Such a customer, in the noted instances, paid the same price as his competitor who has his cement delivered and all competitors were afforded the same accommodation. All customers may decide for themselves whether it is to their advantage to come and get the cement and when they do so they are benefitted by having the privilege (*supra* p. 8). There is no discrimination for or against anyone.

Certainly there is no evidence that Huron did this in combination or concerted action with its competitors. It is Huron's individual act.

CONCLUSION

We respectfully submit that the judgment and decree of the Court below should be affirmed for the reasons stated above which may be summarized as follows:

The undisputed positive facts are that Huron's pricing and trade practices were highly competitive and legal in all respects. Huron was at all times completely independent of its competitors in establishing, maintaining and changing its prices, pricing policies and trade practices.

Huron was not a party to any combination or conspiracy for any purpose. Huron did not follow the trade practices which the Commission said were engaged in by concerted action of all members of the industry to support an alleged unlawful "system" of pricing cement. In fact, Huron did not follow any "system" of pricing cement.

The Commission made no finding of any fact which controverts the above contentions of Huron. There is no evidence from which a contrary fact could properly have been found or be justly inferred. In the elaborate Findings, the Commission ignored all of the facts regarding Huron's pricing policies and trade practices as set forth in this brief.

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